

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING**

76-1458

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1458

UNITED STATES OF AMERICA,

Appellee,

-against-

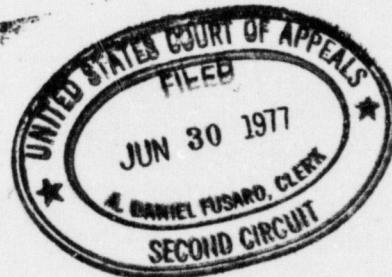
ALBERT ANZALONE,

Appellants.

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Pls

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING



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UNITED STATES COURT OF APPEALS
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PRELIMINARY STATEMENT

The petitioner, Albert Anzalone, herein respectfully prays that this Honorable Court rehear the decision of a panel of this Court "Circuit Judges Feinberg, Gurfein and Meskill" entered on May 6, 1977 (Appellate Docket No. 650 September Term, 1976).

This petition for rehearing is filed pursuant to Rule 40 of the Federal Rules of Appellate Procedure.

In the above-mentioned decision the Court affirmed the conviction of Anzalone of making false declarations before a Grand Jury in violation of 18 U.S.C. § 1623.

The Court reversed the conviction of Anzalone for violation of 42 U.S.C. § 3631 (fair housing law).

It is the contention of the appellant Anzalone that the Appellate Court should also have reversed the conviction of making false declarations before a Grand Jury in violation of 18 U.S.C. § 1623, as well as the violation of 42 U.S.C. § 3631.

REASONS FOR GRANTING
THE PETITION OF
APPELLANT ANZALONE

(1)

It is clear that the judges of the Circuit Court found that the Government used the immunized testimony of Anzalone before the same Grand Jury that indicted the appellant. The Court then held:

"It is, accordingly, the rule of the circuit that when, as here, the same grand jury that heard the immunized testimony indicts the defendants, the conviction must be reversed and the indictment dismissed, with respect to substantive offenses. We must therefore reluctantly reverse the convictions of both appellants on all but the false declaration counts." Id. at page 3394.

The Court then went on to consider the exact same state of facts with reference to the false declaration counts. The Court then held:

"We hold that the grant of immunity did not protect the grantee against the false declarations he knowingly made under the federal immunity grant, and

that the proper body to determine whether the declarations made were, in fact, false was the trial jury. By its verdict, it established that the declarations were false and, hence, outside the immunity conferred." Id. at page 3395.

It is respectfully submitted that this bifurcation of the rule in U.S. v. Kurzer, 534 F.2d 511, (2d Cir. 1976) is unfair and in violation of the constitutional rights of the appellant. It is respectfully submitted that a true interpretation of the Kurzer rule, supra, is that once evidence is "tainted" and thereafter used by the Government, any indictment obtained thereon must be dismissed. Murphy v. Waterfront Commission, 378 U.S. 52, 79 (1964).

It is clear that every United States Attorney who had anything to do with the prosecution of the within case, had access to the minutes of the immunized state grand jury testimony. To find that:

"No evidence was derived either directly or derivatively from the state grand jury testimony." Id. at page 398.

as the Circuit Court did in the case at bar, is to ignore all of the evidence adduced at the post-trial evidentiary hearing in the case at bar.

(2)

The Government has argued in their Cross-Petition for Rehearing that Anzalone waived any claim as to the validity of the indictment. Rule 12, Federal Rules of Criminal Procedure. It is respectfully submitted that this claim is specious.

An examination of the Minutes of a pre-trial proceeding dated January 8, 1976 before the Hon. Edward R. Neaher clearly belies the Government's contention. These minutes were included in the Supplemental Index to record on appeal.

The above-mentioned minutes clearly show that not only did the attorney for Albert Anzalone raise a Motion for a Severance based upon the immunized grand jury testimony (p. 5)*; said attorney also moved to preclude the Government from offering said evidence (p. 6).

It is respectfully submitted that a reading of the entire transcript of the pre-trial motion of January 8, 1976 clearly shows that the Court's decision reserved and "deferred for determination" all of the issues raised with reference to the immunized grand jury testimony to a time subsequent to trial pursuant to Rule 12(e) of the Federal Rules of Criminal Procedure.

Therefore, reading the pre-trial motion of January 8, 1976 together with the post-trial motions based upon the immunized grand jury testimony of the appellant Anzalone, the issue was most properly preserved for review.

It is clear, that in the context of all of the proceedings had in the instant case there was no waiver on

* refers to Minutes of Pre-Trial proceeding dated January 8, 1976.

the part of the appellant. It is respectfully submitted that if the "waiver issue is the sole issue raised by the Government in its' Petition for Rehearing, said Petition should be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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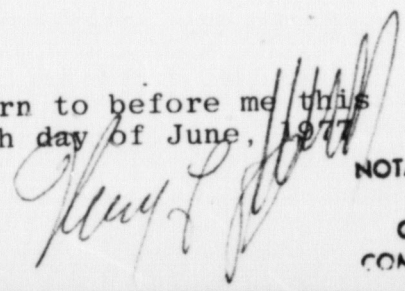
STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

PATRICIA GREER , being duly sworn, deposes and
says: deponent is not a party to the action, is over 18 years
of age and resides at Brooklyn, New York.

On ~~June~~ 27, 1977 deponent served the within Petition
for Rehearing upon DAVID G. TRAGER, United States Attorney,
Eastern District of New York, and RONALD E. DEPETRIS, Assistant
U.S. Attorney (of counsel), attorneys for the United States
in this action, at U.S. Courthouse, 225 Cadman Plaza East,
Brooklyn, New York, the address designated by said attorney for
that purpose by depositing a true copy of same enclosed in a
post-paid properly addressed wrapper, in an official depository
under the exclusive care and custody of the United States Postal
Service within the State of New York.


PATRICIA GREER

Sworn to before me this
27th day of June, 1977


HARVEY L. GREENBERG
NOTARY PUBLIC, STATE OF NEW YORK
NO. 24-6645705
QUALIFIED IN KINGS COUNTY
COMMISSION EXPIRES MARCH 1978

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification
By Attorney

certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's
Affirmation

shows: deponent is

the attorney(s) of record for
in the within action; deponent has read the foregoing
and knows the contents thereof; the same is
true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Check Applicable Box

☐ Individual
Verification

the
the foregoing
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as
to those matters deponent believes it to be true.

☐ Corporate
Verification

the
a
foregoing
is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and
belief, and as to those matters deponent believes it to be true. This verification is made by deponent because
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,

☐ Affidavit
of Service
By Mail

On 19 deponent served the within
upon
attorney(s) for
in this action, at

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit
of Personal
Service

On 19 at
deponent served the within upon

herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir: Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

HARVEY L. GREENBERG

Attorney for

Office and Post Office Address

**950 Third Avenue
NEW YORK, N. Y. 10022**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir: Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on

19

at

M.

Dated,

Yours, etc.,

HARVEY L. GREENBERG

Attorney for

Office and Post Office Address

**950 Third Avenue
NEW YORK, N. Y. 10022**

To

Attorney(s) for

Index No. 76-1458

Year 19

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AFFIDAVIT OF MAILING

HARVEY L. GREENBERG

Attorney for Appellant

Office and Post Office Address, Telephone

**950 Third Avenue
NEW YORK, N. Y. 10022**

212 752-3874

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for